

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE LORAZEPAM & CLORAZEPATE
ANTITRUST LITIGATION

This order applies to:
ADVOCATE HEALTH CARE; ST. CHARLES
HOSPITAL AND REHABILITATION CENTER;
DIK DRUG COMPANY and HARVARD PILGRIM
HEALTH CARE, INC., on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

MYLAN LABORATORIES, INC; MYLAN
PHARMACEUTICALS, INC.; UDL LABORATORIES,
INC.; CAMBREX CORPORATION; PROFARMACO,
s.r.l.; GYMA LABORATORIES OF AMERICA, INC.
AND SST CORPORATION,

Defendants.

FILED

JUL 17 2001

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MDL Docket No. 1290
Misc. No. 99-276 (TFH/JMF)

MEMORANDUM OPINION

During the deposition of Roger Foster ("Foster"), counsel for defendants Mylan Laboratories, Inc. and Mylan Pharmaceuticals, Inc. ("Mylan") objected to certain questions on the grounds of privilege and relevancy. The privileges asserted were attorney-client and attorney work product. The "Direct Purchaser Plaintiffs" ("plaintiffs") have now moved to compel Foster's testimony as to those questions. In moving to compel, however, plaintiffs have all but ignored the law of this Circuit pertaining to the attorney-client privilege. With the exception of one case pertaining to waiver, plaintiffs never discuss the law of this Circuit which articulates with great specificity the nature of the attorney-client privilege.

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As I have pointed out, in this Circuit the attorney-client privilege protects confidential communications made by the client to the attorney for the purpose of seeking legal advice or legal representation. Eugene Burger Management Corp. v. HUD, 192 F.R.D. 1, 4 (D.D.C. 1999) and cases therein. The attorney-client privilege protects the communications made by the attorney to the client, but only insofar as the attorney's communications disclose communications from the client. Id. and cases cited therein. Thus, an attorney's advice to a client is privileged from disclosure insofar as the disclosure of the advice would in turn disclose a communication from the client which the client intended to be confidential. An analogy is helpful. If a man asks a lawyer how to provide for an illegitimate child whose paternity he has never admitted, knowing the advice the lawyer gave would disclose the information the client provided in confidence. If, on the other hand, disclosure of the attorney's advice does not disclose anything the client communicated in confidence because, for example, the information given the lawyer by the client was not intended by the client to be confidential, there is no privilege for the advice. Thus, if two companies announce a merge and tell the world that a disinterested attorney had provided them with an opinion that their merger did not violate any antitrust laws, no court would protect what the attorney told them. The purpose of the attorney-client privilege is to encourage clients to be as candid as possible with their counsel. In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982). There is, however, no reason to believe that clients would be less willing to share confidences with their attorneys if the court mistakenly protects as privileged advice which does not reveal a communication that was intended to be confidential.

There is, of course, a second "privilege" operative here, namely the work product

privilege. To protect the adversarial process and to free lawyers from concerns that documents which reveal how they are preparing for trial and their mental processes might be revealed to their opponents, Rule 26 protects from ordinary discovery “documents and tangible things” prepared in anticipation of litigation or for trial by a party or its representative, including its attorney. Fed. R. Civ. P. 26(b)(3). Unlike the attorney-client privilege, this privilege is defeated if the party seeking discovery establishes a substantial need for the documents or other tangible thing in the preparation of his case and also an inability, without undue hardship, to obtain their substantial equivalent by other means.

When the true nature of both privileges, one from disclosure and one from discovery, is appreciated, it becomes clear that plaintiffs’ motion is misguided. Plaintiffs argue, for example, that the attorney-client privilege was waived because Mylan shared the advice at issue with other people. However, that puts the cart before the horse. Before determining whether a privilege has been waived, one must ask whether it exists in the first place. As I have just explained, the lawyer’s advice is not in itself privileged; it becomes privileged only insofar as disclosing it explicitly or implicitly discloses what a client told the attorney in confidence to secure that advice or insofar as the advice was given to advance the attorney’s representation of the client. It has to follow, then, that if the advice Foster gave or got with reference to any transaction or contract does not disclose anything an employee of Mylan told Foster in confidence to secure his advice or advance his representation of Mylan, the attorney-client privilege does not exist. It also follows that anything that Foster, in his capacity as a client, told outside counsel for Mylan in confidence to secure counsel’s advice is equally privileged.

When the nature of the privilege is understood, the nature of the waiver becomes equally

clear. The attorney-client privilege can be waived by any actions of the client which are inconsistent with an intention to keep the communication, shielded by the privilege, confidential. In re Subpoenas Duces Tecum, 738 F.2d 1367, 1370 (D.C. Cir. 1984). See also In re Sealed Case, 676 F.2d 793, 811 (D.C. Cir. 1982).

When this is understood, it becomes apparent that plaintiffs also misunderstand the nature of the waiver which will force disclosure. If the advice Foster gave or got is not in itself privileged, whether he or any other employee of Mylan shared it with anyone is irrelevant. The real question is whether Foster, or anyone employed by Mylan, disclosed a confidential communication, otherwise protected by the attorney-client privilege, to anyone who did not have and could not claim an attorney-client privilege with Foster or with counsel for Mylan. If they did, then they waived the confidentiality of that communication.

The work product privilege can also be waived. In re Subpoena Duces Tecum, 738 F.2d at 1370-1375.^{*} But, leaping to a waiver analysis is unnecessary unless and until plaintiffs fail to defeat the work product privilege by establishing a substantial need for the documents and an inability to secure their substantial equivalent without undue hardship. F. R. Civ. P. 26(b)(3). In this case, if plaintiffs cannot make that showing, they have a right to try to establish that Mylan or Foster waived the work product privilege by behavior inconsistent with its protections.

It must be recalled that the work product privilege of Fed. R. Civ. P. 26(b)(3) is a privilege against the discovery of documents and tangible things prepared by an attorney for a party or in anticipation of litigation. Nevertheless, protecting an attorney's "mental impressions, conclusions, opinions, or legal theories of an attorney . . . concerning the litigation," Fed. R. Civ. P. 26(b)(3), from disclosure is within the penumbra of the protection created by the

Supreme Court's decision in Hickman v. Taylor, 329 U.S. 495, 571 (1947), even though the attorney does not commit them to writing. Alexander v. FBI, 192 F.R.D. 12, 16 (D.D.C. 2000); Athridge v. Aetna Casualty & Surety Co., 184 F.R.D. 200, 209 (D.D.C. 1998). It would be perverse to rule that an attorney could not be forced to disclose a memorandum to his file in which he summarized his impressions of the strength and weakness of a witness's testimony, but could be asked during a deposition to provide the same information. However, with that said, it must be remembered that the work product privilege pertains only to an adversarial context, arising only when litigation has commenced or is anticipated. There is no basis in any precedential authority of which I am aware for shielding from disclosure everything an attorney does or thinks merely because he is an attorney. Thus, I see a radical difference in Foster's "work product" (using the term generically) during negotiations which lead to the agreements at issue and his "work product" once litigation is truly anticipated. I am aware of no privilege which protects what Foster says to others during or about negotiations unless it discloses what a client told him in confidence. On the other hand, what Foster says to others once litigation is anticipated is protected if it tends to disclose his mental processes provided, as is true here, that it is reasonable to anticipate that Foster's client and those other persons will be parties on the same side of the anticipated litigation and are thereby preparing a common defense at the time of the discussions wherein Foster expresses his views and discloses his thinking as to the litigation.

My analysis of the legal issues is thus so radically different from plaintiffs' in their Motion to Compel that deciding it is a waste of time and I will deny it without prejudice. To prevent the rock from rolling back down the hill, I have provided the parties with my tentative

rulings, using the principles articulated in this memorandum. By seeing how I anticipate I will finally rule and having a more complete understanding of how I interpret the privileges claimed, the parties may be able to resolve their differences and narrow their disputes to the essential. I emphasize, however, the word "tentative." It has been my constant experience that it is difficult, to the point of being impossible, to rule definitively and clearly on attorney-client and work product privileges solely on a single question or an entry in a privilege log. I find that I must often permit counsel, under my guidance, to ask additional questions to flesh out all of the circumstances surrounding the privilege claim. Additionally, while I keep them to the barest minimum, I have on occasion had to conduct an *in camera* voir dire examination, later sealing the transcript, in order to permit me to rule. Consistent with that experience, and because I understand that the parties contemplate that my rulings as to the questions posed to Foster may control the results in other depositions, I will order that the parties conduct any deposition (including the continuation of Foster's) in which a privilege will be claimed in my presence when I am available. If they wish, they may avail themselves of the court's video conferencing facilities or of the small courtroom next to my chambers if it is available. After I conduct whatever inquiry I see fit, and permit the parties to ask additional, relevant and appropriate questions I will rule.

Furthermore, I note that while plaintiffs premise their motion on the attorney-client privilege, other objections were made on grounds of relevance and violation of a protective order.

First, Foster was asked what legal fees Mylan had paid for its defense to date and for indemnification of other parties to the agreements which are the subject of this lawsuit. Foster

at 65. He was also asked whether Mylan had filed a claim pertaining to this litigation with any insurance carrier. Foster at 67. Under Rule 26, as amended, a party “may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party.” Fed. R. Civ. P. 26(b)(1). The amount of fees incurred is neither privileged nor relevant to any claim or defense asserted and I will sustain the objection.

Second, Rule 26 requires a party to produce “any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.” Fed. R. Civ. P. 26(a)(1)(D). Thus, without any consideration of relevancy, this Rule requires the production of any insurance agreement Mylan has with a carrier which “may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.” Id. Since the Federal Rules require production of such an agreement without even a request for it, they expressly authorize the question plaintiffs asked and Foster refused to answer. Foster will have to answer the question.

Finally, during Foster’s deposition, plaintiffs’ counsel tried to enter an exhibit identified as Bates number CP 01889. Mylan’s counsel protested that this document “came out of Cambrex production” and “was probably highly confidential pursuant to the order.” Foster at 129. He refused to let Foster see it. In their pleadings, the parties do not explain to me the nature of their dispute and what the “Cambrex production” is. Before Foster’s deposition resumes, plaintiffs will have to file a supplemental submission answering Mylan’s charge that a court order prohibited Foster’s seeing the document.

An Order, containing my tentative rulings and denying plaintiff’s Motion to Compel

without prejudice, accompanies this Memorandum Opinion.


JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Dated: 7/16/01

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Defendants.

FILED

JUL 17 2001

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

Pursuant to the Memorandum Opinion issued herewith, I make the following tentative
rulings:

Marked Questions from the Deposition of Roger Foster

Page(s)	Witness	Question	Tentative Ruling
23	Foster	Has Board of Directors asked Foster to do any additional fact finding or report back to them about FTC action?	Sustained. Board's request to counsel was intended to be confidential.

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Page(s)	Witness	Question	Tentative Ruling
24	Foster	Was anything distributed to Board with respect to any kind of economic analysis, projections, or calculations concerning disgorgement?	Overruled. May answer yes or no. If answer is yes, and counsel asks what was distributed, Foster must say generally what is was. Whether Foster can be asked to produce will turn on application of the work product privilege.
43	Foster	In conversations among Foster, Puskar, and Disner, were particular transactions discussed or was it a general discussion?	Sustained. Discussion between Foster, functioning as a client, and Disner, functioning as attorney, were intended to be confidential.
65	Foster	What was the amount of legal fees paid to Mylan to date?	Sustained. Irrelevant.
67	Foster	Has Mylan has made any insurance claims with respect to the litigation?	Overruled. Rule 26 requires disclosure.
76	Foster	What was the nature of discussions among lawyers for Mylan, Gyma, Profarmaco, Cambrex, and SST?	Nature of objection not stated. If attorney-client, inapplicable because no communication from a client. If work product, then work product privilege applies unless plaintiff can meet 26(b)(3) standard.
77	Foster	What was the nature of discussions with Stupar concerning the factual content of depositions?	Nature of objection not stated. If attorney-client and Stupar is client, then communication intended to be confidential. If work product, then work product privilege applies unless plaintiff can meet 26(b)(3) standard.
110	Foster	Was Foster asked by anyone to have Disner review a contract with Profarmaco?	Overruled as to attorney-client privilege provided Foster need answer only yes or no. Further inquiry tends to disclose whether communication intended to be confidential.

Page(s)	Witness	Question	Tentative Ruling
113	Foster	Did Foster provided Disner with any information about how many manufacturers were actively supplying API for these particular drugs?	Sustained. Viewing Foster as client, communication was intended by Foster to be confidential.
114	Foster	Was contract sent to Disner for review as antitrust attorney?	Sustained. While nature of retention ordinarily not privileged, here it would tend to disclose a communication which was confidential.
116	Foster	What were the differences between first and second draft of document?	Overruled. Objection based on disclosure of legal advice or legal analysis. But, advice is not privileged and differences do not appear to disclose any confidential communication intended to be confidential.
129	Foster	May Foster see document from Cambrex which is confidential pursuant to order?	More information required.
143-144	Foster	What was said at first telephone conference among lawyers for Mylan and lawyers for FIS and SST?	More information required.
175	Foster	What did Stupar tell Foster concerning effect of contact between Mylan and Gyma on other generic manufacturers such as Purepac?	Sustained. Communication intended to be confidential.
176	Foster	What was the substance of conversation between Foster and Stupar after receipt of fax from Fox?	Sustained. Communication intended to be confidential.

Page(s)	Witness	Question	Tentative Ruling
210-211	Foster	In discussions between Foster, Disner, and Rosdeicher on behalf of SST and FIS, was there a discussion of exchanging 10% of gross profits on lorazepam sales for SST to stay out of the market or a discussion of whether Mylan could substantially raise its prices if it had two main sources of API supply under control and Mylan's competitors' supplies would dry up for 12 to 18 months?	More information required.

Privilege Log

Doc. Number & Description	Date	Author	Recipient	Privilege	Tentative Ruling
1. Handwritten notes	11/30/98	Stupar	Foster	AC/WP	More information required
2. Handwritten notes	Undated	Stupar	Foster	AC/WP	More information required
3. Fax	12/14/98	Stupar	Ballard cc: Foster	AC/WP	AC-sustained WP-sustained
4. Fax	12/14/98	Stupar	Ballard cc: Foster	AC/WP	AC-sustained WP-sustained
5. Report	11/25/98	Stupar	Foster	AC/WP	AC-sustained WP-sustained
6. Report	11/25/98	Stupar	Foster	AC/WP	AC-sustained WP-sustained
7. Report	11/25/98	Stupar	Foster	AC/WP	More information required

8. Report	11/25/98	Stupar	Foster	AC/WP	More information required
9. Report	11/25/98	Stupar	Foster	AC/WP	AC-sustained WP-sustained
10. Fax	12/14/98	Stupar	Foster	AC/WP	More information required
11. Report	11/25/98	Stupar	Foster	AC/WP	More information required
12. Fax	8/13/98	Previs	Jackson Sunseri Foster Schilling Richardson Satter	AC/WP	AC-sustained WP-more information required
13. Handwritten notes	Undated	Summers		AC	More information required
14. Fax	11/17/97	Disner	Summers	AC/WP	More information required
15. Draft	11/13/97	Cambrex	Mylan	AC/WP/ CI	More information required
16. Fax	11/13/97	Summers	Disner	AC/WP	AC-sustained WP-sustained
17. Fax	11/13/97	Summers	Disner	AC/WP	AC-sustained WP-overruled
18. Draft	11/24/97			AC	More information required
19. EMPTY					EMPTY
20. Draft	11/6/97			AC	More information required
21. Draft	10/28/97			AC	More information required

22. Draft	11/6/97	Jeffries	Summers	AC/WP/ CI	More information required
23. Handwritten notes	Undated	Summers	Stupar	AC	More information required
24. Fax	10/24/97	Stupar	Clawges	AC	Overruled
25. Draft	10/24/97			AC	Overruled
26. Draft	Undated			AC	Overruled
27. Draft	10/23/97			AC	Overruled
28. Draft	10/24/97			AC	Overruled
29. Draft	10/24/97			AC	Overruled
30. Draft	10/28/97			AC	Overruled
31. Draft	Undated			AC	Overruled
32. Fax	10/26/97	Disner	Foster	AC/WP	More information required
33. Fax	10/29/97	Summers	Disner	AC	Sustained
34. Fax	10/21/97	Summers	Disner	AC/WP	AC-sustained WP-overruled
35. Draft	10/22/97			AC	Overruled
36. Draft	10/21/97			AC	More information required
37. Draft	Undated			AC	More information required
38. Draft	Undated			AC	Overruled
39. Draft	Undated			AC	Overruled
40. Draft	7/20/97			AC	Overruled
41. Draft	Undated	Summers		AC	More information required

42. Handwritten notes	11/4/97	Summers		AC/WP/CI	AC-sustained WP-overruled
43. Handwritten notes	11/3/97	Summers		AC/WP	More information required
44. Handwritten notes	10/21/97	Summers		AC/WP/CI	AC-more information required WP-overruled
45. Handwritten notes	Undated	Beto		WP	More information required
46. Draft	Undated			AC	Overruled
47. Letter	12/18/97	Cambrex	Foster	AC/WP/CI	AC-overruled WP-more information required
48. Handwritten notes	12/14/98	Deiriggi	Foster	AC/WP	More information required
49. Draft	11/18/96	Ford	Jackson Foster DeGeorge	AC/WP	More information required
50. Letter	2/1/99	Smiley	Puskar	AC	More information required
51. Memorandum	8/31/98	Wolfe	Foster cc: Darby Doan Kann Roscher Schilling	AC/WP	More information required
52. EMPTY					EMPTY
53. Draft	5/4/98			AC	Overruled

54. Letter	11/6/97	Stupar	Foster Deiriggi Buseman Summers O'Donnell DeBone	AC/WP	More information required
55. Letter	5/4/98	Newland	Owens	AC/WP	AC-overruled WP-overruled
56. Memorandum	11/19/97	Summers	Foster	AC/WP	More information required
57. Letter	3/17/98	Disner	Foster	AC/WP	More information required
58. Memorandum	3/3/98	DeGeorge	Puskar cc: Todd Jackson Foster Schilling	AC/WP	More information required
59. Memorandum	2/27/98	DeGeorge	Foster cc: Schilling	AC/WP	More information required
60. Fax	6/25/98	Abbe	Beto	AC/WP	AC-overruled WP-overruled
61. Handwritten Memorandum	Undated	Summers	Beto	AC/WP	More information required
62. Fax	3/15/98	Krinke	Foster Beto	AC/WP	More information required
63. Table	5/14/99	Workman	Galioto	AC/WP	More information required
64. E-Mail	12/17/97	Jeffries	Summers	AC/WP/ CI	AC-overruled WP-overruled
65. E-Mail	12/16/97	Jeffries	Summers	AC/WP/ CI	More information required
66. E-Mail	12/1/97	Jeffries	Summers	AC/WP/ CI	AC-overruled WP-overruled

67. E-Mail	11/6/97	Jeffries	Summers	AC/WP/ CI	AC-overruled WP-overruled
68. E-Mail	11/6/97	Jeffries	Summers	AC/WP/ CI	AC-overruled WP-overruled
69. Memorandum	Undated	Wilkins	Calabria	AC/WP	More information required
70. EMPTY					EMPTY
71. Handwritten Notes	Undated	Beto		WP	Overruled
72. Report	11/25/98	Stupar	Foster	AC/WP	More information required
73. Report	11/25/98	Stupar	Foster	AC/WP	More information required
74. Fax	12/14/98	Stupar	Ballard cc: Foster	AC/WP	More information required

Redacted Documents Privilege Log

Doc. Number & Description	Date	Author	Recipient	Privilege	Tentative Ruling
1. Board Minutes	1/14/99	Smiley		AC/WP	More information required
2. Memorandum	2/10/98	Foster	Sunseri Puskar	AC/WP	AC-overruled WP-overruled
3. Handwritten Notes	2/2/99			AC	Overruled

4. Report	5/10/99	Deiriggi Harper Owens Wilson	Addicks Bottini Clark Darby DeBone Jackson Korman O'Donnell Richardson Sherry Sisto Stupar cc: Campbell Foster Puskar Sanzen	AC	Overruled
5. Report	2/24/99	Deiriggi Owens Wilson	Bottini Clark Darby DeBone Jackson Korman O'Donnell Richardson Sherry Sisto Stupar cc: Campbell Foster Puskar Sanzen Todd	AC	Overruled
6. Report	4/8/99	Pittman	Summers	AC	Overruled
7. Fax	4/7/99	Pittman	Summers cc: Dale	AC	Overruled

8. Report	11/10/97	Deiriggi Owens Wilson	Addicks Cayton Govil Huang Krinke LaCagnin Miller Monteleone Runyon Bottini Clark Darby DeBone Jackson O'Donnell Stupar cc: Campbell Foster Mancinelli Puskar Sanzen Sisto Todd	AC	Overruled
9. Report	4/24/98	Deiriggi Owens Wilson	Addicks Cayton Govil Huang Krinke LaCagnin Mancinelli Miller Monteleone Runyon cc: Campbell Foster Puskar Sanzen Sisto Todd	AC	Overruled

10. Report	2/24/99	Deiriggi Owens Wilson	Bottini Clark Darby DeBone Jackson O'Donnell Sisto Stupar cc: Campbell Foster Puskar Sanzen Todd	AC	Overruled
11. Fax	8/20/99	Foster	Korman	AC	Overruled
12. EMPTY					EMPTY
13. Memo	4/11/97	Marchetti	Bergen Campbell Cayton Cosner Crunkleton Darby DeBone Hamrick Jackson Kann Krinke Mancinelli Marchetti McMillen Sanzen Sisto Stupar Summers Witt	AC	Overruled

14. Memo	3/11/97	Marchetti	Bergen Campbell Cayton Cosner Crunkleton Darby DeBone Hamrick Jackson Kann Krinke Mancinelli Marchetti McMillen Sanzen Sisto Stupar Summers Witt	AC/WP	More information required
15. Board minutes	10/22/98	Smiley		AC/WP	More information required
16. Board minutes	7/30/98	Smiley		AC/WP	More information required

It is ordered that Plaintiffs' Motion to Compel [19] is denied without prejudice.

SO ORDERED.


JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Dated: 7/16/01